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5 MICHAEL LENTINI,  
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10 Plaintiff,

11 No. C17-03911 WHA

12 v.  
13 KELLY SERVICES, INC.;  
14 and CUTCO STORES, INC.,  
15 Defendants.

16 /  
17 **ORDER GRANTING DEFENDANTS'**  
18 **MOTION TO TRANSFER TO**  
19 **EASTERN DISTRICT OF MICHIGAN**  
20 **AND DENYING AS MOOT MOTION**  
21 **FOR MORE DEFINITE STATEMENT**

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28 **INTRODUCTION**

In this wrongful termination and wage-and-hour-action, defendants move to transfer venue. Plaintiff opposes. For the reasons herein, defendants' motion is **GRANTED**.

**STATEMENT**

In October 2014, plaintiff Michael Lentini signed an agreement as part of his employment application with defendant Kelly Services, Inc., a staffing agency, which provided that "any action arising out of [the] Application, Agreement, or relationship between [Lentini] and Kelly established herein shall be brought only in the State of Michigan Courts of appropriate venue, or the United States District Court sitting in Michigan, and [Lentini] consent[s] to and submit[s] [himself] to the jurisdiction of such courts" (Dkt. No. 14-1 ¶ 3, Exh. A). He was hired and began to work for Kelly in November 2014. Through Kelly, Lentini was assigned various jobs as a "demonstrator" which involved him going to stores such as Costco Wholesale and demonstrating the use of different appliances.

1 One company Kelly staffs for is Cutco Stores, Inc. In March 2016, Kelly referred  
2 Lentini to an assignment with Cutco, whereby Kelly remained his employer and Cutco assumed  
3 operational control over the assignment (Dkt No. 13 ¶ 10; Dkt. No. 20-1, Exh. D). In June 2016,  
4 a representative from Kelly terminated Lentini's employment over the telephone, allegedly for  
5 cursing at a Costco member, leaving a booth unattended, and impermissibly using a computer  
6 at a Costco location (Dkt. No. 13 ¶ 27).

Lentini initiated the instant action in the Superior Court of California, San Mateo County in June 2017. Defendants removed to the United States District Court for the Northern District of California. Following removal, Lentini filed his first amended complaint, alleging fourteen claims under the California Labor Code and Fair Labor Standards Act, including wrongful termination, retaliation, and failure to pay overtime wages (Dkt. No. 13).<sup>1</sup> Defendants move to transfer this action to the United States District Court for the Eastern District of Michigan under the terms of the forum-selection clause contained in the Kelly employment agreement signed by Lentini. Defendants also move for a more definite statement (Dkt. No. 24). This order follows full briefing and oral argument.

## ANALYSIS

17 This order undertakes the necessary two-step analysis when a party moves to transfer  
18 venue pursuant to a forum-selection clause. It first considers whether the forum-selection clause  
19 at issue is valid, then turns to the public-interest factors under 28 U.S.C. 1404. Finally, this  
20 order addresses whether Cutco, a non-signatory to the agreement, can enforce the forum-  
21 selection clause against Lentini.

22 A forum-selection clause should be enforced unless the party challenging enforcement  
23 of such a provision can show it is unreasonable. *M/S Bremen v. Zapata Off-Shore Co.*,  
24 407 U.S. 1, 10 (1972). Both the Supreme Court and our court of appeals have construed  
25 this exception narrowly. A forum-selection clause may be found unreasonable under three  
26 circumstances: “(1) if the inclusion of the clause in the agreement is the product of fraud or

<sup>1</sup> Lentini previously filed a class action lawsuit against Kelly in the United States District Court, for the Central District of California, from which he subsequently voluntarily withdrew from (Case No. 2:16-cv-3898). He alleges his participation in that suit as the basis for his retaliation claim.

1 overreaching; (2) if the party wishing to repudiate the clause would be effectively deprived of  
2 his day in court were the clause enforced; and (3) if enforcement would contravene a strong  
3 public policy of the forum in which the suit is brought.” *Murphy v. Schneider National, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (citing *M/S Bremen*, 407 U.S. at 12–18).  
4 The forum-selection clause in this action does not fall into any of these three categories,  
5 as now explained.

7 **1. THE AGREEMENT WAS NOT THE PRODUCT OF FRAUD.**

8 The provision in Lentini’s employment agreement which mandates that all disputes be  
9 adjudicated in Michigan was not the product of fraud or overreaching. It was presented on the  
10 page of the agreement which he signed, under the heading, “Choice of Law and Jurisdiction  
11 and Forum,” printed in reasonably large font (Dkt. No. 14–1, Exh. A). The forum-selection  
12 clause was neither hidden, nor was Lentini tricked into accepting it. Lentini claims that the  
13 forum-selection clause is unenforceable because it was not reasonably communicated to him.  
14 Specifically, he alleges that “defendants did not explain the significance of the forum-selection  
15 clause or make any attempt to draw Lentini’s attention to it,” and it was presented “in a take it or  
16 leave it package of documents that required only a mouse click for consent” (Dkt No. 20 at 6).

17 In *Moretti*, a forum-selection clause found to be reasonably communicated was contained  
18 in a “Terms of Use” hyperlink, to which customers consented to by checking the “Acceptance  
19 Box.” *Moretti* held that it was sufficient to “require a user to affirmatively accept the terms,  
20 even if the terms are not presented on the same page as the acceptance button as long as the user  
21 has access to the terms of service.” *Moretti v. Hertz Corp.*, 2014 WL 1410432, at \*2 (N.D. Cal.  
22 April 11, 2014) (Judge Jeffrey White). Here, Lentini had access to the electronic agreement  
23 containing the forum-selection clause as part of the package of application documents to which  
24 he consented by the click of a mouse after signing. The clause was thus reasonably  
25 communicated to Lentini.

26 Lentini argues that because defendants are multi-national corporations and he is an  
27 individual lacking in business acumen, the inclusion of the forum-selection clause was the  
28 product of overreaching (Dkt. No. 20 at 6). “A differential in power or education on a

1 non-negotiated contract will not vitiate a forum selection clause.” *Murphy*, 362 F.3d at  
 2 1141 (citing *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991)). “To decline  
 3 enforcement of a forum-selection clause merely on the showing of non-negotiability and  
 4 power difference . . . would disrupt the settled expectations of the parties [] and would threaten  
 5 the ability of employers to require that disputes with their employees normally be settled in  
 6 their neighborhood, absent some other exigency.” *Ibid.*

7 Neither *Murphy* nor *Spradlin* — decisions Lentini relies on — supports his position.  
 8 In neither decision did the courts find the forum-selection clause was a product of fraud  
 9 or overreaching, despite power disparities between the parties. The plaintiff in *Murphy*,  
 10 for example, was a truck driver educated up to the tenth grade who was also presented a  
 11 non-negotiable contract by a large company. See *Murphy*, 362 F.3d 1133. Our court of appeals  
 12 nevertheless held that his assertions were predicated upon a claim of power differential and  
 13 non-negotiability and were insufficient to overcome the strong presumption in favor of enforcing  
 14 forum-selection clauses. *Id.* at 1141. In *Spradlin*, our court of appeals found there was no  
 15 overreaching by a multinational military support company, despite the fact that its employment  
 16 contract contained a Saudi Arabian forum-selection clause and it was “highly foreseeable that  
 17 terminated American employees [would] be required to return to the United States and thus face  
 18 considerable obstacles in bringing wrongful termination actions.” *Spradlin v. Lear Siegler*  
 19 *Mgmt. Servs. Co.*, 926 F.2d 865, 869 (9th Cir. 1991).

20 Like the above cases, Lentini has failed to show fraud or overreaching despite there  
 21 being a power differential between Lentini and Kelly. If Lentini was savvy enough to do the  
 22 demonstrator job in dealing with the public, he was savvy enough to understand what he was  
 23 signing, provided he cared enough to even glance over it. Here, the provision was not the  
 24 product of fraud or overreaching.

25 **2. NOT DEPRIVED OF DAY IN COURT.**

26 Lentini has also failed to show that he would be deprived his day in court in Michigan.

27 In *Murphy*, our court of appeals held that “the combination of [plaintiff]’s alleged  
 28 financial troubles and physical limitations would bar him from litigating his claim in

United States District Court  
For the Northern District of California

1 Wisconsin.” *Id.* at 1143. “Murphy and the weight of persuasive authority from this district and  
2 other jurisdictions suggest that neither severe physical limitation nor economic hardship alone is  
3 generally enough.” *Pratt v. Silversea Cruises, Ltd.*, 2005 WL 1656891, \*3 (N.D. Cal. 2005)  
4 (Judge Susan Illston).

5 Here, Lentini alleges that he “lacks the financial ability to bear the costs and  
6 inconvenience of litigating in Michigan” and in his declaration provides details about his  
7 considerable financial difficulties (Dkt. No. 20 at 8; Dkt. No. 20-1 ¶¶ 27–35). He also declares,  
8 however, that he started a new, full-time job in June 2017, and in his first amended complaint  
9 does not allege any physical limitations that would prevent travel (Dkt. No. 20-1 ¶ 28; Dkt. No.  
10 13 ¶¶ 10, 18, 19, 24, 25). Plainly, Lentini does not suffer from the “combination of . . . financial  
11 troubles and physical limitations” that can conspire to deprive a litigant of his day in court.  
12 *Murphy*, 362 F.3d at 1143.

13 Lentini claims that he will be unable to compel by subpoena or otherwise be unable to  
14 afford to bring to trial his “key witnesses,” who allegedly reside in either “Northern California”  
15 or the “Western Region of the United States” (Dkt. No. 20 at 8). Lentini has named only one  
16 witness, however — an area manager for Cutco — and has failed to specifically allege where  
17 any of his potential witnesses are currently located (Dkt No. 20-2 at 2). Specific allegations  
18 are necessary to show that enforcement of a forum-selection clause would cause the sort of  
19 inconvenience which would deprive a party of their day in court. *Compare Spradlin*,  
20 926 F.2d at 869 (“[plaintiff] has failed even to offer any specific allegations as to travel costs,  
21 availability of counsel[], location of witnesses, or his financial ability to bear such costs and  
22 inconvenience”), *with Petersen v. Boeing*, 715 F.3d 276, 281–82 (9th Cir. 2013) (“[plaintiff]  
23 plausibly alleged that the majority of his witnesses would be American. He named at least 16  
24 such witnesses, including other [] employees who experienced similar conditions . . .”).

25 Moreover, Lentini lives in Los Angeles County, hundreds of miles from San Francisco.  
26 Considering the likely cost of travel, meals, and lodging for him to appear in San Francisco,  
27 Lentini’s argument that transfer to Michigan would prevent him from litigating his case is  
28 unconvincing. The incremental burden would only be slight.

1           **3. THE FORUM-SELECTION CLAUSE  
DOES NOT CONTRAVENE PUBLIC POLICY.**

2           Finally, transfer would not contravene any strong public policy of California. Absent a  
3 total foreclosure of remedy in the transferee forum, a forum-selection clause is only  
4 unreasonable when it contravenes a policy specifically related to venue. *See, e.g., Jones v. GNC*  
5 *Franchising, Inc.*, 211 F.3d 495, 497–498 (9th Cir. 2000).

6           Lentini argues that “the public policy in favor of full and prompt payment of an  
7 employee’s earned wages is fundamental and well established” (Dkt. No. 20 at 9). This policy,  
8 however, is not specifically tethered to venue, and Lentini has made no showing that his rights  
9 will suffer from litigating his case in Michigan. Although Lentini would prefer to adjudicate  
10 his rights in a California forum, his preference is a private-interest factor which may not be  
11 considered under this factor. *See Monastiero v. appMobi, Inc.*, No. C 13-05711 SI. 2014 WL  
12 1991564, at \*6 (N.D. Cal. May 15, 2014). Therefore, Lentini’s wage claims under the California  
13 Labor Code have no effect on the validity of the forum-selection clause.

14           Lentini similarly asserts that transfer should be denied because his “representative action  
15 under the Private Attorney’s General Act . . . is not waivable” and it is “clearly not available  
16 under the laws of the State of Michigan” (Dkt. No. 20 at 9–11). Because the instant motion  
17 seeks a forum-selection rather than a choice-of-law determination, Lentini’s burden is to show a  
18 fundamental public policy underlying California’s Private Attorney’s General Act that relates to  
19 venue. *See, e.g., East Bay Women’s Health, Inc. v. gloStream, Inc.*, No. C 14-00712 WHA, 2014  
20 WL 1618382, at \*3 (N.D. Cal. April 21, 2014). He has failed to show his PAGA claim will be  
21 affected in any way by the venue it is litigated in. Therefore, transfer would not contravene any  
22 strong public policy of California.

23           Lentini further argues that “when a forum-selection clause is coupled with a choice-of-  
24 law clause, the Court may not consider the practical consequences of enforcing a forum selection  
25 clause that operates in tandem with a choice of law provision” (Dkt. No. 20 at 10). Lentini  
26 wrongly assumes, however, that the validity of a choice-of-law clause is at issue in the present  
27 motion. A forum-selection clause is “separate and distinct from choice of law provisions that are  
28 not before the court.” *Besag v. Custom Decorators, Inc.*, 2009 U.S. Dist. LEXIS 13582, at \*10

1 (N.D. Cal. Feb. 10, 2009) (Judge Jeffrey White). Moreover, Lentini's argument that Michigan's  
2 labor laws might prove less protective than California's is speculative and is beside the point  
3 since this motion deals with forum, not choice of law. It may yet be the case that a Michigan  
4 court will decide to apply the substantive law of California.

5 For the foregoing reasons, the forum-selection clause is not unreasonable and is therefore  
6 valid.

7 **4. PUBLIC INTEREST FACTORS DO NOT PRECLUDE TRANSFER.**

8 Where there is a valid forum-selection clause, courts may nevertheless weigh  
9 public-interest factors in deciding whether to transfer. *Atlantic Marine*, 134 S.Ct. at 582.  
10 "Because [public-interest] factors will rarely defeat a transfer motion, the practical result is that  
11 forum-selection clauses should control except in unusual cases." *Ibid.* Public interest factors  
12 include: "(1) the local interest in the lawsuit; (2) the court's familiarity with the governing law;  
13 (3) the burden on local courts and juries; (4) congestion in the court; and (5) the costs of  
14 resolving a dispute unrelated to a particular forum." *Boston Telecomm'ns Group v. Wood*,  
15 588 F.3d 1201, 1211 (9th Cir. 2009).

16 There is nothing exceptional here which would warrant disrupting the legitimate  
17 expectations of the parties. Lentini concedes that the third and fourth factors are neutral.  
18 Only the first factor, California's interest in protecting the rights of its citizens, weighs against  
19 transfer. The second factor is neutral because a federal court in Michigan is capable of applying  
20 both federal and California law to Lentini's claims. Finally, as to the fifth factor, this dispute  
21 is not unrelated to Michigan. Kelly is headquartered in Troy, Michigan (Dkt. No. 14-1 at 2).  
22 This factor is neutral. Only the first factor weighs in Lentini's favor. This is not enough to deny  
23 transfer in light of the private-interest factors presumed in favor of defendants and the force of  
24 the forum-selection clause. *Atlantic Marine*, 134 S.Ct. at 582-83. It is in the interest of justice  
25 that the parties be held to their bargain.

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1           **5. DEFENDANT CUTCO MAY ENFORCE THE FORUM-SELECTION CLAUSE.**

2           Lentini contends that if the forum-selection clause is valid, “it does not govern where  
 3 Lentini may bring suit against Cutco, because Defendant Cutco is not a party to that Agreement”  
 4 (Dkt. No. 20 at 13). This argument fails because non-parties to an agreement containing a  
 5 forum-selection clause can benefit from such a clause in litigation concerning conduct related  
 6 to the agreement. *See Holland America v. Wartsila North America, Inc.*, 485 F.3d 450 (9th Cir.  
 7 2007); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988).

8           Plaintiff cites *Manetti-Farrow* in support of his argument against enforcement.  
 9 There, our court of appeals held that enforcement was valid as to non-signatory defendants  
 10 because the non-signatories “were involved in some way in ratifying or executing the contract  
 11 between the signatories.” This is not the only condition under which a third party may claim  
 12 the benefit of a forum-selection clause, however. In *Holland America*, the plaintiff had entered  
 13 into a contract with the defendant which conducted surveys of plaintiff’s cruise ships. After an  
 14 accident destroyed one of its ships, the plaintiff brought suit against that defendant and two  
 15 other survey-conducting entities which were separate corporations and not parties to the  
 16 original contract, but had performed surveys in the United States and Canada. Our court of  
 17 appeals upheld enforcement of the forum-selection clause in the original contract against  
 18 both non-signatory defendants “because any transactions between [non-signatory defendants]  
 19 and [plaintiff] took place as part of the larger contractual relationship between [plaintiff] and  
 20 [signatory defendant],” also noting that “the record reflects that one of the few things upon  
 21 which the parties agree is that [plaintiff]’s relationship with [non-signatory defendants] arose out  
 22 of and was intimately related to its relationship with [signatory defendant].” *Holland America*,  
 23 485 F. 3d at 456; *Id.* at n.2.

24           So too here.

25           Lentini’s employment relationship with Cutco clearly took place as part of the larger  
 26 contractual relationship between Lentini and Kelly. This is reflected in the very agreement  
 27 containing the forum-selection clause which states: “I understand I may be offered employment  
 28 with Kelly Services, Inc., subject to my availability for work, *Kelly’s ability to find suitable*

1       assignments for me, and results of reference checking or other employment-related screening  
 2       procedures" (Dkt. No. 14–1, Exh. A) (emphasis added). Moreover, contained in a document  
 3       on Kelly Services letterhead titled, "Sales Demonstrator Acknowledgment Form for CUTCO  
 4       STORES Assignments," is the following:

5           EMPLOYEE shall be employed as a DEMONSTRATOR by *Kelly*  
 6       *Services*. As the employer of record, Kelly is responsible for all  
 7       tax withholding from your gross wages and CUTCO STORES will  
 8       retain operational control over your assignments. EMPLOYEE'S  
 9       duties shall include demonstrating and actively promoting CUTCO  
 STORES products for sale as assigned [] in the various store  
 locations of the third party companies listed on Attachment A [],  
 using promotional images or materials provided by CUTCO  
 STORES.

10          (Dkt. No. 20–1, Exh. D) (emphasis added). Understandably, Lentini himself understood  
 11       this document to govern his employment relationship with both Cutco and Kelly (Dkt. No. 20–1  
 12       at 4). Lentini now brings claims against Kelly and Cutco, alleging conduct which is directly  
 13       related to his contractual relationship with both parties. Because Cutco is willing to submit to  
 14       the forum-selection clause, it is not unreasonable or unjust to enforce the clause even though it  
 15       did not sign the agreement. *See Holland America*, 485 F. 3d 450. Cutco may therefore benefit  
 16       from the forum-selection clause contained in Lentini's agreement with Kelly.

17          Finally, Lentini argues that the agreement containing the forum-selection clause at issue  
 18       was either terminated or superseded.<sup>2</sup> This argument is unpersuasive. The language in the  
 19       agreement he relies on merely states that "once 14 days have passed since [his] last day worked,  
 20       [his] employment with Kelly will be terminated" — it says nothing about the *agreement itself*  
 21       being terminated (Dkt. No. 14–1, Exh. A). Moreover, the time periods in which Lentini claims  
 22       to have been unemployed contradict what is provided in his first amended complaint.

23          The forum-selection clause remains valid and enforceable. Therefore, this order transfers  
 24       the action to the forum preselected by the parties.

27          2 In his opposition, Lentini claims that on "February 6, [2016]," he signed a new agreement with Kelly  
 28       that supersedes his 2014 agreement (Dkt. No. 20 at 20). The agreement Lentini points to, however, is a travel  
 expense policy form. It does not purport to override his employment agreement with Kelly.

## CONCLUSION

For the foregoing reasons, the motion to transfer is **GRANTED**. Defendants' motion for a more definite statement is **DENIED AS MOOT**. The clerk shall transfer this action to the United States District Court for the Eastern District of Michigan.

## **IT IS SO ORDERED.**

Dated: October 2, 2017.

W<sup>m</sup> Alsop